(6)

Supreme Court, U.S.
FILED
MAY 7 2002
OFFICE OF THE CLERK

NO. 01-1420

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, ET AL.,

Petitioners,

v.

GUARDIANSHIP ESTATE OF DANNY KEFFELER, BY WANDA PIERCE, GUARDIAN, AND OTHER PERSONS SIMILARLY SITUATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

REPLY TO BRIEF IN OPPOSITION

CHRISTINE O. GREGOIRE
Attorney General

William Berggren Collins
Sr. Assistant Attorney General
Counsel of Record
1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6245

Walter Dellinger
Pamela Harris
O'Melveny & Myers
555 13th Street NW
Washington, D.C. 20004
202-383-5300

Counsel For Petitioners

10 pp

TABLE OF CONTENTS

REPLY TO BRIEF IN OPPOSITION.....1

1. This Case Presents An Important National Question.....1
2. Keffeler Is In Substantial Conflict With Decisions Of Other Courts.....5
3. Keffeler Conflicts With Social Security Regulations.....7
4. Conclusion.....9

TABLE OF AUTHORITIES

Cases

C.G.A. v. Alaska
824 P.2d 1364 (Alaska 1992) 5

Guardianship Estate of Keffeler v. Department of Soc. & Health Servs.
45 Wash. 2d 1, 32 P.3d 267 (2001) ..... passim

In re Guardianship of Nelson
547 N.W.2d 105 (Minn. Ct. App. 1996)..... 6, 7

King v. Schafer
940 F.2d 1182 (8th Cir. 1991),
cert. denied sub nom. Crytes v. Schafer,
502 U.S. 1095 (1992)..... 5, 6

Mason v. Sybinski
280 F.3d 788 (7th Cir. 2002) 5, 6

Mellies v. Mellies
815 P.2d 114 (Kan. 1991)..... 6, 7

Statutes

42 U.S.C. § 405(j)..... 1

42 U.S.C. § 407(a) 1, 2

Regulations

20 C.F.R. § 404.2040..... 7

20 C.F.R. § 404.2040(a)(1)..... 8

20 C.F.R. § 416.640(a)..... 8

REPLY TO BRIEF IN OPPOSITION

1. This Case Presents An Important National Question

a. The question presented in this case is whether a representative payee, appointed pursuant to 42 U.S.C. § 405(j), violates the anti-attachment provisions of 42 U.S.C. § 407(a) when the payee uses a beneficiary's social security benefits to pay for the beneficiary's current care. In *Guardianship Estate of Keffeler v. Department of Social & Health Services*, 145 Wash. 2d 1, 32 P.3d 267 (2001) (Pet. App. at A-1), the Washington Supreme Court held that § 407(a) prohibits a payee from using the benefits to pay for current care, at least when the payee otherwise would pay for the beneficiary's care itself.

This is an important national question. The significance of the question is confirmed by the amicus briefs filed by the Solicitor General, on behalf of the United States,[1] twenty six states, and the Commonwealth of Puerto Rico; and four national child welfare advocacy groups—the Childrens' Defense Fund, Catholic Charities USA, the Child Welfare League of America, and the Alliance for Children And Families. These briefs recognize the significance of the issue and urge the Court to grant the petition. Indeed, the Solicitor General urged the Court to grant the stay in this case because he concluded that the Court would probably grant the petition and would likely reverse. Br. United States Amicus Curiae at 14-21.

---

[1] Brief For The United States As Amicus Curie filed in response to this Court's order dated February 15, 2002, inviting the Solicitor General to express the views of the United States with regard to the Petitioners' application for a stay.

b. Respondent Estate of Keffeler (the Estate) makes essentially two arguments to avoid certiorari. The Estate's primary argument is that the holding in *Keffeler* is narrow—limited to the application of Washington statutes and regulations. Br. Opp. at 10-14. The Estate's characterization of the Washington Supreme Court's opinion is wrong.

The linchpin of *Keffeler's* analysis is that Washington will pay for a foster child's care itself if social security benefits are not available. It is this point--not Washington statutes and regulations—that the court relied on to justify its conclusion that the Department of Social & Health Services (the Department) violated § 407(a). The court held that "reimbursement is barred by § 407(a) because despite [the Department's] status as representative payee *it performs the role of creditor when it takes the foster child's SSA entitlement to reimburse itself for moneys spent on the child*". Pet. App. at A-25 (emphasis added). The Washington statutes and regulations on cost recovery were not determinative. Indeed, according to the Washington Supreme Court, the "thrust of the case law is that Social Security benefits are, for all intents and purposes, beyond the reach of the state, however clever or subtle its attempt to seize them". Pet. App. at A-23. Thus, even if Washington had no statutes or regulations on cost recovery, *Keffeler* would find a violation of § 407(a) if the Department used the benefits to pay for the beneficiary's current care.

Keffeler also relies on the fact that Washington will pay for a foster child's care to support its conclusion that the Department is not acting in the beneficiary's best interest. According to *Keffeler*, "the child is better off with any payee other than the state because [the Department] must provide

foster care under state law *regardless* of whether it receives a reimbursement". Pet. App. at A-19 (footnote omitted). This led to the court's doubt that "using the [social security] benefits to reimburse the state for its public assistance expenditure is in all cases, or even some, in the best interests of the beneficiary". Pet. App. at A-28 (internal quotation marks omitted). *Keffeler's* conclusion that it is not in a child's best interest to use the benefits to pay for current care is not dependent upon state statutes and regulations.

In sum, *Keffeler* is not the narrow decision the Estate claims it is. *Keffeler* announces a broad rule that § 407(a) prohibits a representative payee, who is responsible for paying for a beneficiary's current care, from using social security benefits to pay for the beneficiary's current care. The amicus briefs filed in this case reflect the substantial national concern over the breadth of *Keffeler's* holding. This case presents a substantial question that should be resolved by this Court.

c. The Estate's second argument against certiorari is its claim that the Department is guilty of an array of regulatory violations. According to the Estate, the "scope and nature of the violations confuses the identification of the precise ground for the Washington Supreme Court's decision". Br. Opp. at 23. But as discussed above, there is no confusion about the grounds for the *Keffeler* decision. The basis for the Washington Supreme Court's decision is the fact that Washington will pay for foster care even if a child has no social security benefits. The analysis in the majority opinion does not even mention—much less rely

on—the so-called regulatory violations claimed by the Estate. Pet. App. at A-18 to A-29. The Estate is attempting to portray this as a muddled case, but it is not. The question presented is straightforward and clear.[2]

---

[2] In addition to being irrelevant to the decision in *Keffeler* and the question presented, the Estate's claims of regulatory violations are untrue. Indeed, a representative of the Social Security Administration, who conducted an onsite review, described the Department as "a model agency that could stand as a prototype for effective organizational payeeship". Pet. App. at A-78. *See also* Br. United States Amicus Curie at 7 ("We have been informed by the SSA that it reviewed the [Department] in August of 1998 and found no defects in its performance as representative payee.").

Nor is there any support in the record for the Estate's claims of regulatory violations. Br. Opp. at 21-23. The Estate refers to "account sweeping". Br. Opp. at 21-22. However, the negative connotation of that term is greater than its meaning. It is nothing more than lump sum payments used to pay for past care. Accounting records in this case establish that the Department uses lump sum payments to pay for past care when there is a delay in granting social security benefits and that the Department only pays for past care in months for which the social security benefits were retroactively granted. *See, e.g.*, State Ex. 1 Suppl., Def.'s Resp. Pl.'s Order Produce 1, Combs, Miracle and 50 Random Accounting, Combs, Miracle. Moreover, there is no finding that so-called account sweeping is improper. Pet. App. A-63, ¶ 58. The Estate also claims that the Department "double dips" by reimbursing the State for amounts already paid by the federal government. Br. Opp. at 22-23. This is not true. The Department's accounting system is set up to prevent this from occurring. Pet. App. at A-70 to A-71, ¶ 88. Finally, the Estate claims that the Department uses benefits to pay for administrative costs. Br. Opp. at 21. This is also untrue, and the Estate cites to nothing in the record to support it's claim. In fact, the record shows that the Department uses benefits only to pay for a beneficiary's care. Pet. App. at A-56 to A-58, ¶¶ 27-37. The only potential problem identified in the record is that the Department "may" experience a double payment when the Department also receives child support to pay for a foster child's care. Pet. App. at A-69, ¶ 82.

2. Keffeler Is In Substantial Conflict With Decisions Of Other Courts

a. In the petition we explained that *Keffeler* conflicts with *Mason v. Sybinski*, 280 F.3d 788 (7th Cir. 2002), *King v. Schafer*, 940 F.2d 1182 (8th Cir. 1991), *cert. denied sub nom. Crytes v. Schafer*, 502 U.S. 1095 (1992), and *C.G.A. v. Alaska*, 824 P.2d 1364 (Alaska 1992). Pet. at 17-20. The Solicitor General agrees. *See* Br. United States Amicus Curie at 14-16. The Estate now attempts to distinguish these cases by claiming that they do not involve "a legislative and regulatory scheme commanding the transfer of the benefits to the state treasury". Br. Opp. at 15.

This argument fails for two reasons. First, it relies on the Estate's mistakenly narrow reading of *Keffeler*. The basis of the *Keffeler* decision is the fact that Washington will pay for foster care even if a child has no social security benefits. This key fact is also present in *Mason*, *King*, and *C.G.A.* *Mason* concerned patients in a mental hospital. Under state law, if "a person is legally admitted to a state institution . . . she is entitled to care and maintenance there, regardless of her ability to pay. Ind. Code § 12-24-5-4." *Mason*, 280 F.3d at 791. *King* involved plaintiffs who were "involuntarily committed to the care and custody of the Director of Mental Health". *King*, 940 F.2d at 1183. Of course, if the plaintiffs had no assets, the state would have to pay for their care since they were involuntarily committed. Similarly, *C.G.A.* involved a minor who was adjudicated a delinquent and placed at a youth center. *C.G.A.*, 824 P.2d at 1365. Since the minor was placed at a youth center, the state was responsible for his care. Even though the state was required to pay for the beneficiaries' care in *Mason*, *King*, and *C.G.A.*, the courts in those cases held that social security benefits could be used to offset the cost of care. These holdings conflict with *Keffeler*.

The second reason the Estate's argument fails is that it is inaccurate as applied to *Mason* and *King*. Contrary to the Estate's argument, both cases involved state laws requiring beneficiaries to pay for their cost of care. In *Mason*, Indiana law provided that "residents of hospitals and institutions are liable for the cost of their treatment and care. Ind. Code § 12-24-13 (2001)." *Mason*, 280 F.3d at 791. Similarly, in *King*, Missouri law provided that the "plaintiffs and their representative payees are jointly and severally liable for the costs of the plaintiffs' care and treatment. *See* Mo. Rev. Stat. §§ 552.080.3, 630.205.1." *King*, 940 F.2d at 1184. Despite these laws, both *Mason* and *King* held that § 407(a) did not prohibit state representative payees from using benefits to offset the cost of care. These decisions conflict with *Keffeler*, and there is no basis to distinguish them.

b. We also explained in the petition that there is a substantial tension between *Keffeler* and *Mellies v. Mellies*, 815 P.2d 114 (Kan. 1991), and *In re Guardianship of Nelson*, 547 N.W.2d 105 (Minn. Ct. App. 1996). Pet. at 20-23. These cases both involve fathers who had been appointed representative payee for their beneficiary sons. Since the fathers, as parents, were under a legal obligation to support their sons, the question was whether they could use social security benefits to pay for their sons' current care. *Mellies* and *Nelson* both held that the fathers could use the benefits to pay for current care. *Keffeler* reaches the opposite conclusion. Since the Department would pay for a beneficiary's current care in the absence of social security benefits, *Keffeler* concluded that it is not in the beneficiary's best interest to use the benefits to pay for current care.

The Estate's attempt to distinguish *Mellies* and *Nelson* also relies on the Estate's mistakenly narrow view of the holding in *Keffeler*. The Estate argues that the cases are

distinguishable because the "parents in these cases were not under a legislative mandate to conserve their own funds". Br. Opp. at 19. On this basis, the Estate claims that *Keffeler* would not prohibit a parent from using social security benefits to pay for current maintenance. Br. Opp. at 19.

The Estate can only reach this conclusion by disregarding *Keffeler's* reasoning. The Estate does not dispute the fact that parents have a legal obligation to support their children. Given this fact, the logic of *Keffeler* compels the conclusion that a parent representative payee may not use the child's benefits to pay for current care. To paraphrase *Keffeler*, a "child is better off with any payee other than the [parent] because [the parent] must provide . . . care under state law *regardless* of whether [the parent] receives a reimbursement". Pet. App. at A-19 (footnote omitted). Based on this reasoning, *Keffeler* concluded that it is not in the best interest of the beneficiary for the Department to use benefits to pay for current care. The same conclusion would apply to a parent. Yet the application of *Keffeler* to a parent cannot be reconciled with *Mellies* and *Nelson*. Accordingly, the Court should grant review to resolve the tension between these cases.

3. Keffeler Conflicts With Social Security Regulations

In the petition we explained that *Keffeler* conflicts with regulations adopted by the Social Security Administration and the Commissioner's interpretation of those regulations. Pet. at 22-23. The Estate argues that *Keffeler* is consistent with the regulations. Br. Opp. at 19-20. But the Estate's argument on this point actually ignores the actual text of the relevant regulation.

According to the Estate, 20 C.F.R. § 404.2040 provides that benefits may be used for current maintenance, including the costs incurred in obtaining food, shelter,

clothing, medical care, and personal comfort items. But the Estate claims that this rule is permissive and subject to the overall requirement that benefits must be used in the best interest of the beneficiary. Br. Opp. at 20. This argument ignores the actual text of the regulation. 20 C.F.R. § 404.2040(a)(1) states:

> "*We will consider that payments we certify to a representative payee have been used for the use and benefit* of the beneficiary if they are used for the beneficiary's current maintenance. Current maintenance includes cost incurred in obtaining food, shelter, clothing, medical care, and personal comfort items." Pet. App. at A-214 (emphasis added).[3]

Under this regulation, if benefits are used for current maintenance, they have been used for the benefit of the beneficiary. There is no other test to determine whether the use of benefits to pay for current maintenance is proper.

The Estate's interpretation also conflicts with the Commissioner's interpretation of 20 C.F.R. § 404.2040(a)(1). As the Solicitor General explained in this case, because Washington pays "the 'cost[s] incurred in obtaining food, shelter, and clothing for the beneficiaries within the meaning of 20 C.F.R. 404.2040(a)(1) and 416.640(1), it is lawful to use a child's Social Security or SSI benefits to pay for them". Br. United States Amicus Curie at 17.

The conflict between *Keffeler* and the social security regulations provides another substantial reason to grant the petition.

[3] *See also* 20 C.F.R. § 416.640(a), Pet. App. at A-237.

4. Conclusion

For the foregoing reasons, the Petition For A Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED

CHRISTINE O. GREGOIRE
Attorney General

Walter Dellinger
Pamela Harris
O'Melveny & Myers
555 13th Street NW
Washington, D.C. 20004
202-383-5300

William Berggren Collins
Sr. Assistant Attorney General
Counsel of Record

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6245

Counsel for Petitioners